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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

THE PEOPLE, Plaintiff and Respondent, v. JESUS REYES SARZA, Defendant and Appellant.	D055530 (Super. Ct. No. SWF013876)

APPEAL from a judgment of the Superior Court of Riverside County, Edward D. Webster, Judge. Affirmed.

A jury convicted Jesus Reyes Sarza of two counts of forcible sodomy (Pen. Code,[1] § 286, subd. (c)(2); counts 1 & 3 involving Jane Doe 1),[2] two counts of spousal abuse (§ 273.5, subd. (e)(1); counts 4 & 5 involving Jane Doe 1), and six counts of lewd acts on a child under the age of 14 (§ 288, subd. (a); counts 6, 7 & 8 involving Jane Doe 2

1 All statutory references are to the Penal Code unless otherwise specified.

2 The jury found Sarza not guilty of the count 2 charge of sodomy on Jane Doe 1.

and counts 9, 10 & 11 involving John Doe). The jury also found true multiple victim enhancements under section 667.61, subdivision (e)(5) with respect to counts 6 through 11. The trial court sentenced Sarza to prison for a total term of 52 years, four months, to life.

Sarza appeals, contending the trial court prejudicially erred in instructing on counts 4 and 5 regarding "traumatic condition" and alternatively erred in refusing to instruct on the lesser included offense of spousal battery for those counts; the court prejudicially erred in overruling his motion in limine to preclude the testimony of the child victims' uncle and grandmother regarding details of each child's belated disclosure of unlawful touchings; there is insufficient evidence to support his count 3 forcible sodomy conviction and his six lewd act convictions; the prosecutor engaged in prejudicial misconduct during closing argument; and the cumulative prejudicial error deprived him of a fair trial. We affirm.

FACTUAL AND PROCEDURAL BACKGROUND

At around 9:44 a.m. on July 21, 2005, Corporal Robert Anderson of the Murrieta Police Department was dispatched to Rancho Springs Medical Center where he met with Jane Doe 1, Sarza's wife, and her six-year-old son John Doe from a previous relationship regarding a reported child molestation. In talking with Jane Doe 1, Anderson learned that Sarza had reportedly touched John Doe inappropriately and had also forcefully sodomized Jane Doe 1 by holding her down against her will the night before as well as on six to seven occasions in the past year. Anderson also asked Jane Doe 1 about several bruises that he observed on her arm and wrist. Jane Doe 1 told him that Sarza had

punched her on the arm the week before and had grabbed her by the wrist another time during an argument. Although the domestic violence had been ongoing for some time, Jane Doe 1 had never reported all the times Sarza had abused her.

In John Doe's separate interview with Anderson, he told him that Sarza had placed his finger in his "butt" at least three times, once when Sarza took him to work with him, once when his mother had gone to Wal-Mart, and another time when his mother was in the shower. On one occasion when John Doe started to cry, Sarza placed his hand over his mouth. John Doe also said that Sarza had done the same thing to his sister Jane Doe 2. A physician who saw John Doe at the medical center noted there were no injuries on him and he did not complain of any pain. However, no sexual assault examination of John Doe was conducted at that time.

While Jane Doe 1 stayed at the medical center to have such an examination conducted for herself, Anderson went back to the police station and then later around 2:30 p.m. drove to Jane Doe 1's residence, which was about two blocks from the police station, and parked nearby where he subsequently arrested Sarza as he returned home around 4:00 p.m. Once Sarza was in custody, dispatch told Anderson that Jane Doe 1 and her children were with her mother, Gloria C., and brother, Leonel C., in a car parked across the street from the residence. When Anderson then met with them, Jane Doe 1 told him she had just learned Jane Doe 2 had disclosed to Leonel that she had also been molested by Sarza. Anderson told them not to talk anymore to Jane Doe 2 about the incident, but directed them to bring her to the station.

At the station, Anderson talked with both Leonel and Gloria, as well as Jane Doe 2. Leonel, the children's uncle, essentially translated for Gloria, their grandmother, who often babysat for the children, and also stated that John Doe had told him that Sarza had molested him two or three times, once at a "dirty old house." Because John Doe also said that Sarza had done the same thing to Jane Doe 2, Leonel had then talked with her separately. Jane Doe 2 started crying as she told her uncle it was true and described Sarza taking her into her room while her mother was in the shower and pulling down her shorts and putting his finger in her vaginal area. She said Sarza had stopped when she started to cry. She had not told anyone about this because she was afraid she would get into trouble.

Jane Doe 2 was examined by a doctor later the evening of July 21, 2005. Although the doctor found some redness or mild irritation in the vaginal area, the findings for that area and the anal area were normal and he could neither confirm or negate sexual abuse. John Doe was not examined for sexual assault purposes.

During the subsequent investigation, it was discovered that Sarza had several misdemeanor assaultive prior convictions for domestic related violence in 2002 (a § 273.5 on July 22, 2002 and a § 245, subd. (a)(1) on Sept. 10, 2002), and both Jane Doe 2 and John Doe were forensically interviewed by the Riverside Child Assessment Team (RCAT). In his August 4, 2005, RCAT interview, John Doe told the interviewer that Sarza not only had hit him with a belt, at various times he had also poked him in his butt with his finger which hurt. John Doe described the first incident as occurring in some bushes, another in a little "dusty" house and a third incident in the living room of their

home. In her RCAT interview,[3] Jane Doe 2 said that when she was six years old, Sarza had called her into the bathroom, had removed her pajamas and underwear and had put his finger in her bottom. Jane Doe 2 explained that this happened many times and once when her mother was taking a shower at night. When she was seven years old, her current age at the time, her brother had told her that Sarza did the same thing to him but only in some dirty bushes or in a dirty house. She did not tell her mother about Sarza doing these things because she was afraid he would spank her if she did. Her Uncle Leo (Leonel) was the first person she told about what had happened to her.

A felony complaint was filed charging Sarza with five felony counts involving sexual and domestic abuse against Jane Doe 1, two counts involving lewd acts upon John Doe, and one count involving three or more lewd acts upon Jane Doe 2. Finally, after a preliminary hearing, many continuances and motions, trial commenced on June 19, 2008, on an amended information charging Sarza with the current crimes, nearly three years after Sarza's arrest for the offenses.

At trial, in addition to the above evidence being presented via Anderson's, Leonel's and Gloria's testimony, as well as the playing of the tapes of the precharging interview of John Doe and the RCAT interviews of both children, Jane Doe 2, who was then 10 years old, testified reluctantly that she did not remember much about the abuse she suffered and said she did not see Sarza, her stepfather, in court. Although she testified that her

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3 Although the written transcript of Jane Doe 2's RCAT interview shows it occurred on August 8, 2004, the reporter's transcript reveals both interviews took place on August 4, 2005.

stepfather hit her, her brother and her mother with a belt and that she was afraid of him because he hurt and spanked her, Jane Doe 2 was too embarrassed to remember what she had told her uncle or a police officer about Sarza touching her.

John Doe, eight years old at the time of trial, who also said he could not see his stepfather in court, testified about multiple acts of sexual and physical abuse by Sarza on himself and about observing Sarza hit his mother with a belt and molest his sister Jane Doe 2. In addition to describing an incident that happened when he went to work with Sarza and ended up in some bushes where Sarza pulled down his pants and inserted his fingers into his bottom which hurt and made him cry, John Doe described other incidents when his sisters were with his mother away from the home and he was alone with Sarza and Sarza again put his fingers in his bottom. John Doe could not recall the number of times Sarza had molested him, but knew that it was more than three times, describing other incidents, including one where Sarza inserted both his fingers and his penis in his bottom inside another house where Sarza took him near his work and yet another time where Sarza inserted his penis into his bottom while sitting in Sarza's car. One time, John Doe saw Sarza take off Jane Doe 2's clothes and touch her bottom and saw that she was crying like he had done. John Doe did not report the molestations to his mother because Sarza had told him not to tell her.

Jane Doe 1 testified that Sarza, whose appearance had changed since the charged incidents occurred, i.e., his hair was much shorter then, had been very controlling and physically abusive throughout their relationship, having first punched her three months after they started dating. Before the instant claims, she had reported only two of the

many instances when Sarza had hit her to the police. One reported occasion occurred while she was pregnant with Sarza's child (not a victim in this case) when he hit her with a broom and curling iron. When she ran outside to escape his abuse, he pulled her by her hair and dragged her back inside. Sarza went to jail for this prior assault.

Jane Doe 1 also testified that she was afraid of Sarza who had often hit her with his hands and a belt. She explained that she had stayed with Sarza not only because she was afraid of him, but also because she wanted his daughter near her dad and always thought Sarza would change. When she talked with Corporal Anderson the first time, she showed him some physical injuries from Sarza's abuse, which included the two bruises he photographed, one to her wrist and the other on her upper arm. Jane Doe 1 explained that the bruise on the wrist had occurred when Sarza pulled on it very hard after becoming angry because she had not put enough salt in the meal she had prepared for dinner one night. She received the other bruise when Sarza punched her several times in the arm after becoming angry that he could not find some peach seeds. The photographs of the bruises were entered into evidence.

Jane Doe 1 further testified that Sarza had also sexually abused her over the course of their six-year relationship by forcing her to have vaginal and anal intercourse with him against her will. When she tried to make him stop, he would do the acts anyway by holding her down. After conceding that she had inconsistently reported that one of the acts of forcible anal intercourse had occurred on July 21, 2005 rather than on July 20 the same day she had learned that Sarza may have molested her two oldest children, Jane Doe 1 noted that such last act of sodomy had happened after she had reluctantly given in

to voluntarily having vaginal intercourse with Sarza. After initially being embarrassed and not being able to remember the specifics, Jane Doe 1 reviewed what she had told Anderson at the time of the incident when it was fresher in her mind and explained that Sarza had touched her on her behind that night, about 10 minutes after the vaginal intercourse, telling her it "doesn't hurt anymore." He then ignored her pushing away and her protestations that it still hurt and she did not want to do it, grabbed on to her and had anal sex with her. Jane Doe 1 said Sarza had forced anal sex on her at least six times earlier in 2005 where she always told him no and physically tried to stop him, but sometimes when it became futile, she just let him do it "so he would stop bothering [her]." Although she acknowledged that her testimony at the preliminary hearing may have conflicted on whether she ever permitted Sarza to have anal sex with her up until six or seven months before the reports of sexual abuse in this case, Jane Doe 1 was adamant that she did not consent to any anal sex between May and July 2005 and that Sarza always knew she did not want to have anal sex, which was always forced.

In the prosecution case, Officer Glen Schnoor also testified about accompanying the minors to their RCAT interviews and observing the interviews behind a one-sided mirror. Schnoor verified that the recordings the jury heard were accurate depictions of the RCAT interviews. He further testified about his interviews with Jane Doe 1 and her mother on August 4, 2005. Jane Doe 1 told him Sarza had physically abused her by beating and forcibly sodomizing her and had threatened to kill her if he went to jail and then got out. She told him she had only reported Sarza's abuse to the police once in 2001, but then went back with him after he convinced her the violence would stop. Schnoor's

report was unclear about the timing of the children's disclosures of molest by Sarza, noting that the grandmother learned about the inappropriate touchings from the children's Uncle Leonel who had learned about them from Jane Doe 1 when the grandmother was giving the children a bath.

A forensic psychologist rounded out the prosecution case, testifying as an expert in general about Child Sexual Abuse Accommodation Syndrome (CSAAS) regarding delays in reporting and about Battered Spouse's Syndrome.

In his defense, Sarza presented an expert, a psychologist, who testified about memory, disclosure and suggestibility in child sexual abuse cases. The expert had reviewed the RCAT interviews of Jane Doe 2 and John Doe. The expert essentially explained that children are susceptible to "confabulation," i.e., the filling in of gaps with inaccurate information due to repetitive questioning, which left open the issue of whether the child was making a false allegation based on suggestibility through the questions or making false denials.

It was stipulated that the sexual assault exam on Jane Doe 1 revealed no physical findings, that no sexual exam was ever conducted on John Doe and that Sarza had pled guilty on July 22, 2002 of a violation of misdemeanor "section 273.5 Unlawful Corporal Injury Resulting in a Traumatic Condition, upon [Jane Doe 1]."

In closing, Sarza's counsel conceded that this case "boils down to credibility of the witnesses" and asked the jury to pick through all the "lies, the inconsistencies and the contradictions" to find Sarza not guilty of any of the sexual assault charges in counts 1, 2, 3 and 6 through 11. Counsel essentially conceded that because there were bruises there

was no question about the counts 4 and 5 spousal batteries and that if the jury found Sarza guilty as to both child victims then the multiple victim allegation would be true. With the exception of count 2, the jury found Sarza guilty of all charges and findings.

DISCUSSION

I

CLAIMED INSTRUCTIONAL ERRORS

During jury instruction discussions the court noted that it would generally give lesser offense instructions when there was some evidence to distinguish between the greater and the lesser offense and because Jane Doe 1 had testified about having bruises there was no basis to give any lessers for battery for the counts 4 and 5 section 273.5 offenses. Defense counsel argued otherwise, stating that if the jury found she did not receive a traumatic condition, then it would only be a battery. Although the court thought "a bruise as a matter of law is a traumatic condition," it would address the matter further if counsel could find some authority otherwise.

The next day, during further instructional discussions, the court noted with regard to counts 4 and 5 that it would probably have to interrupt defense counsel if she argued that a bruise is not a traumatic condition based on the holding in *People v. Gutierrez* (1985) 171 Cal.App.3d 944 (*Gutierrez*), which in essence noted that bruises were "inherent in the definition that both serious and minor injury is embraced in traumata of all kinds." (*Id*. at p. 952.) Defense counsel disagreed, pointing out that *Gutierrez* was an old case and her belief that the question of whether a traumatic condition existed was always a factual issue for the jury. Counsel argued that because the instructions define a

traumatic condition as "a wound or other bodily injury, whether minor or serious, caused by the direct application of physical force," it was within the jury's purview to determine whether the minimal bruises in this case were minor or significant injuries sufficient to constitute trauma. Counsel was therefore objecting to the court not giving the lesser of a section 243, "the injury on a cohabitant or spouse. . . ."

The court disagreed, stating it understood the difference between a section 243, subdivision (e) and a section 273.5 "was whether there was physical evidence of an injury." Although the court found the defense position reasonable that an injury might be so minor that the jury should be allowed to decide whether it is a traumatic condition, it thought that a section 273.5 was essentially proven "if there has been the application of force and that force leaves a bruise." The court reiterated that the holding in *Gutierrez, supra,* 171 Cal.App.3d 944, supported "the definition that a traumatic condition includes a bruise" and thus thought the current state of the law would not require the giving of the lesser section 243 where there were obvious bruises, as in this case. The court further commented that if it did give such lesser offense instruction, it would also define in the instruction that a traumatic condition includes bruises.

The prosecutor agreed with the court, opining that the only possible need to give the lesser instruction would be if the defense were arguing that the bruises on Jane Doe 1 came from something else or were unrelated to Sarza striking her, neither of which was supported by the facts presented in this case. In the absence of such position, the prosecutor requested the court modify the jury instruction to include a statement that a bruise is a traumatic condition. The prosecutor conceded, however, that the jury still

needed to determine whether the evidence before it supported the definition of traumatic condition for that element of the count 4 and 5 offenses.

When defense counsel then represented that her argument was only that the bruises were so minor that they do not amount to a traumatic condition, the court ruled it would not give the lesser included offense instructions, nor would it modify the definition of traumatic condition in the jury instructions to include that a bruise constitutes such condition as the prosecution requested. The court later noted that it was refusing to give instructions for the lesser offenses of battery or battery upon a spouse under sections 242 and 243 for the reasons it had already stated.

Subsequently, the court instructed the jury with CALCRIM No. 840 in pertinent part as follows:

> "The defendant is charged in counts 4 and 5 with inflicting injury on the mother of his child that resulted in a traumatic condition in . . . section 273.5[,] subdivision (e). To prove that the defendant is guilty of that crime the People must prove that, number one, the defendant willfully and unlawfully inflicted a physical injury on the mother of his child; and, number two, the injury inflicted by the defendant resulted in a traumatic condition. [¶] Someone commits an act willfully when he or she does it willingly or on purpose. [¶] A traumatic condition is a wound or other bodily injury, whether minor or serious, caused by the direct application of physical force. [¶] A traumatic condition is the result of an injury if, number one, the traumatic condition was the natural and probable consequence of the injury; the injury was a direct and substantial factor in causing the condition; and the condition would not have happened without the injury."

During closing arguments, the prosecutor told the jury that a minor injury such as a bruise satisfies the traumatic condition element for the count 4 and 5 charges. In her argument, defense counsel acknowledged that the bruises were there and stated she

would leave it to the jury to determine whether Jane Doe 1 was telling the truth about the peach and the salt incidents charged as counts 4 and 5 where Sarza purportedly became angry and hit and grabbed Jane Doe 1 causing the bruises.

On appeal, Sarza does not challenge the sufficiency of the evidence to support counts 4 and 5, but only complains that the trial court prejudicially erred by refusing to modify CALCRIM No. 840 to explain that bruises are de minimis injuries that do not constitute a traumatic condition as a matter of law. He alternatively argues that the court erred by refusing to instruct on the lesser included offenses of battery and battery on a spouse, because the injuries he inflicted on Jane Doe 1 were de minimis and thus not punishable under section 273.5. We find no instructional error.

Initially, we note that contrary to his representations, Sarza did not request a modification of CALCRIM No. 840 and the court did not instruct the jury that bruises constituted traumatic conditions as a matter of law. Rather it was the prosecutor who had requested a modification to state that bruises were traumatic conditions, which the record shows the court refused to make. As the People properly point out in the respondent's brief, there is simply no legal support for Sarza's position that CALCRIM No. 840 should state that bruises are de minimis injuries that cannot be considered a traumatic condition.

Contrary to Sarza's arguments otherwise, *Gutierrez* does not require that instructions on the lesser offenses of battery and spousal battery be given in every case where a felony section 237.5, corporal injury resulting in a traumatic condition on a spouse, is charged. Even though lesser offense instructions were given in *Gutierrez*, the court noted that it was "*injury* resulting in a traumatic condition that differentiates [the

section 273.5] crime from [the] lesser offenses." (*Gutierrez, supra*, 171 Cal.App.3d at p. 952.) The court in *Gutierrez* traced the use of the words "traumatic condition" in statutes and case law and noted the dictionary definition of trauma included " 'an injury or wound to a living body caused by the application of external force or violence (injuries . . . such as sprains, bruises, fractures, dislocation, concussion--indeed *traumata* of all kinds . . .).' It is inherent in the definition that both serious and *minor* injury is embraced--'*traumata of all* kinds.' " (*Ibid*.) The court explained that while "[s]ome other offenses do require higher degrees of harm to be inflicted before the crime denounced by them is committed[, such as felony battery and felony assault,] the Legislature has clothed persons of the opposite sex in intimate relationships with greater protection by requiring less harm to be inflicted before the offense is committed." (*Ibid*.)

Sarza appears to argue that regardless of the definition of traumatic condition, which includes any variety of injury despite its degree of seriousness, that the instructions should be modified to provide the jury an alternative for lesser injuries that do not justify a felony verdict. However, as the trial court noted, the law is clear that traumatic condition includes any resulting injury no matter how minor or serious. (See *People v. Wilkins* (1993) 14 Cal.App.4th 761, 771 [reddened skin on wife's nose and face resulting from her husband's punches]; *People v. Beasley* (2003) 105 Cal.App.4th 1078, 1085 [bruises on cohabitant's arms, legs and back resulting from defendant's strikes with vertical blind rod].) CALCRIM No. 840, without modification, correctly instructed the jury with regard to section 273.5 based on the evidence that showed Jane Doe 1 had

obvious physical injuries, bruising on her wrist and arm, caused by Sarza hitting and grabbing her.

Moreover, on this record, the trial court properly refused to instruct on the lesser offenses of battery and battery of a spouse. Although a trial court has a duty to instruct on lesser included offenses when there is evidence that would support a conviction of the lesser offense (*People v. Mendoza* (2000) 24 Cal.4th 130, 174), "a lesser included instruction need not be given when there is no evidence that the offense is less than that charged. [Citation.]" (*Ibid*.) In other words, a trial court must only instruct on a lesser included offense if there is substantial evidence to support a jury's determination that the defendant was only guilty of the lesser offense, but not the greater offense. (*People v. Breverman* (1998) 19 Cal.4th 142, 162.) Because it was undisputed that the evidence showed bodily injury on Jane Doe 1, and Sarza was not arguing that he did not cause such injuries or bruises, there was no evidentiary support for the theory he could only be found guilty of the lesser offense of spousal battery. No instructional error is shown.

II

SUFFICIENCY OF EVIDENCE

Sarza complains that the evidence is insufficient to support his count 3 forcible sodomy conviction against Jane Doe 1 and his counts 6 through 11 lewd acts upon a child convictions involving Jane Doe 2 and John Doe. We conclude there was sufficient evidence to support all counts.

In reviewing the sufficiency of the evidence to support a conviction, we determine " 'whether from the evidence, including all reasonable inferences to be drawn therefrom,

there is any substantial evidence of the existence of each element of the offense charged.' [Citations.]" (*People v. Crittenden* (1994) 9 Cal.4th 83, 139, fn. 13.) Under such standard, we review the facts adduced at trial in full and in the light most favorable to the judgment, drawing all inferences in support of the judgment to determine whether there is substantial direct or circumstantial evidence the defendant committed the charged crime. (*People v. Hillhouse* (2002) 27 Cal.4th 469, 496; *People v. Rodriguez* (1999) 20 Cal.4th 1, 11.) The test is not whether the evidence proves guilt beyond a reasonable doubt, but whether substantial evidence, of credible and solid value, supports the jury's conclusions. (*People v. Arcega* (1982) 32 Cal.3d 504, 518; *In re Nathaniel C.* (1991) 228 Cal.App.3d 990, 996.)

In making the determination, we do not reweigh the evidence; the credibility of witnesses and the weight to be accorded to the evidence are matters exclusively within the province of the trier of fact. (Evid. Code, § 312.) We simply consider whether " ' "*any* rational trier of fact could have found the essential elements of [the charged offenses] beyond a reasonable doubt." ' [Citations.]" (*People v. Rich* (1988) 45 Cal.3d 1036, 1081.) Unless it is clearly shown that "on no hypothesis whatever is there sufficient substantial evidence to support the verdict" the conviction will not be reversed. (*People v. Hicks* (1982) 128 Cal.App.3d 423, 429.)

A. Count 3 Forcible Sodomy

With regard to the count 3 forcible sodomy charge, such alleged that Sarza sodomized Jane Doe 1 "by force, violence, duress, menace, and fear of immediate and unlawful bodily injury" in violation of section 286, subdivision (c)(2), "on or about

January 1, 2005, through and including May 2005." In order to prove that Sarza was guilty of this charge, the prosecution had to prove that: "1. The defendant committed an act of sodomy with another person; [¶] 2. The other person did not consent to the act; [¶] AND [¶] 3. The defendant accomplished the act: [¶] by force, violence, duress, menace, or fear of immediate and unlawful bodily injury to someone." (CALCRIM No. 1030.) The instructions on the offense defined sodomy as "any penetration, no matter how slight, of the anus of one person by the penis of another person," and noted that "[i]n order to consent, a person must act freely and voluntarily and know the nature of the act." (CALCRIM No. 1030.)

The instructions also told the jury that "[a]n act is accomplished by force if a person uses enough physical force to overcome the other person's will" and that "[d]uress means a direct or implied threat of force, violence, danger, hardship, or retribution that causes a reasonable person to do or submit to something that he or she would not otherwise do or submit to. When considering whether the act was accomplished by duress, consider all the circumstances, including the age of the other person and [her] relationship to the defendant." (CALCRIM No. 1030.)

The instructions further told the jury that the "defendant is not guilty of forcible sodomy if he actually and reasonably believed that the other person consented to the act. The People have the burden of proving beyond a reasonable doubt that the defendant did not actually and reasonably believe that the other person consented. If the People have not met this burden, you must find the defendant not guilty." (CALCRIM No. 1030.)

The prosecutor argued at trial that although Jane Doe 1 specifically described the forcible sodomy that happened to her on July 20, 2005, she said such act had also happened six or seven times earlier that year and had described it in more detail to Corporal Anderson as occurring in May, June and earlier in July. The prosecutor claimed the real issue was whether Jane Doe 1 had consented and as to such issue argued that Jane Doe 1 was consistent in stating she always said no, always tried to push Sarza away and at times gave in but only under duress. Sarza's counsel countered that the evidence was insufficient to support either the count 2 (alleged to have occurred between June and July 19, 2005) or the count 3 (alleged to have occurred between January and May 2005) sodomy charges, arguing there was no evidence of any specific acts other than those described for the count 1 July 20 incident and that Jane Doe 1's general testimony Sarza committed the acts of sodomy on her five or six times was not enough to support counts 2 or 3.

As noted above, the jury found the evidence sufficient to support count 3, but not count 2. On appeal, Sarza claims the "generic" testimony that he forcibly sodomized Jane Doe 1 at a nonspecific time in the six-month period alleged for count 3 is insufficient as a matter of law to sustain that conviction. He also essentially argues Jane Doe 1's testimony and pretrial statements regarding any such general instances of sodomy were so inconsistent as not to be substantial to support his count 3 conviction. We disagree.

It is well settled that in cases charging child molestation over a period of time, generic testimony may suffice to support a conviction. (*People v. Jones* (1990) 51 Cal.3d

294, 314 (*Jones*).) This same reasoning has been applied to cases where " '*a mature victim might understandably be hard pressed to separate particular incidents of repetitive molestations by time, place or circumstance*.' " (*People v. Matute* (2002) 103 Cal.App.4th 1437, 1445 (*Matute*).) As our Supreme Court stated in *Jones*, "[i]t must be remembered that even generic testimony (e.g., an act of intercourse 'once a month for three years') outlines a series of *specific*, albeit undifferentiated, incidents, *each* of which amounts to a separate offense, and *each* of which could support a separate criminal sanction." (*Jones, supra*, at p. 314.) Generally, such generic testimony is adequate to support a conviction where the victim describes "*the kind of act or acts committed* with sufficient specificity, both to assure that unlawful conduct indeed has occurred and to differentiate between the various types of proscribed conduct . . . . Moreover, the victim must describe the *number of acts* committed with sufficient certainty to support each of the counts alleged in the information . . . . Finally, the victim must be able to describe *the general time period* in which these acts occurred . . . , to assure the acts were committed within the applicable limitation period. Additional details regarding the time, place or circumstance of the various assaults may assist in assessing the credibility or substantiality of the victim's testimony, but are not essential to sustain a conviction." (*Id.* at p. 316.)

Here, Jane Doe 1 testified about the type of acts committed, describing forced anal intercourse or sodomy, stated the number of acts committed were about six or seven times, and noted the general time period when the acts occurred was between January and July 2005, specifically remembering one incident in May 2005. Although Jane Doe 1 is

not a child victim, and there were conflicts in her testimony and pretrial statements, the jury could have reasonably concluded that due to Sarza's physical abuse during their relationship she was a mature victim who was understandably unable to differentiate specific incidents of repeat forced anal intercourse by giving specifics of "time, place or circumstance." (*Matute, supra,* 104 Cal.App.4th at p. 1445.) Under such circumstances, Jane Doe 1's generic testimony, was sufficient to support the count 3 sodomy conviction. We do not reweigh the evidence.

Although the jury did not find Sarza guilty of count 2, which alleged sodomy between June and July 19, 2005, such finding does not, as Sarza argues, weaken the evidence supporting the count 3 conviction. Interestingly, the trial judge questioned the jurors about their verdicts on the sodomy counts, asking them whether he understood correctly that "the reason in your opinion . . . for the not guilty [on count 2] is [Jane Doe 1] could only specifically describe two incidences [of sodomy] and so you had some concerns about the third one; is that a fair statement?" When the jury foreperson responded, "Yes, specifically it's the time window," the judge stated "that kind of analysis is impressive, and I want to commend you on being able to focus down so carefully." We agree with the trial judge's assessment and conclude substantial evidence supports the jury's count 3 verdict.

B. Counts 6 through 11 Lewd Acts

With regard to counts 6 through 11, Sarza was charged with violations of section 288, subdivision (a) which punishes "[a]ny person who willfully and lewdly commits any lewd or lascivious act . . . upon or with the body, or any part or member thereof, of a

child who is under the age of 14 years, with the intent of arousing, appealing to, or gratifying the lust, passions or sexual desires of that person or the child. . . . " (§ 288, subd. (a).) Sarza contends that the three counts alleging such lewd acts against Jane Doe 2 and the three counts alleging such acts against John Doe are not supported by substantial or credible evidence due to the numerous inconsistencies and contradictions in the child victims' testimony which was so thoroughly impeached that no rational jury could have found beyond a reasonable doubt that any improper touching took place. Sarza also argues that because Jane Doe 2 could not identify him in the courtroom even though his appearance for the most part had not changed since she had lived with him, that to uphold his convictions involving Jane Doe 2 would be a denial of his rights to due process and a fair trial.

In support of his various arguments regarding the lack of sufficient evidence for the three counts involving John Doe, Sarza relies on his expert's testimony about suggestibility from repeat questioning of minor victims to argue that John Doe's story about his different molests "got bigger and better with each successive questioning session," which culminated in the prosecutor's leading questions about the touchings at trial. Sarza claims the "unrelenting series of interrogations of a very young boy created false images in his as yet unformed mind," which coupled with the lack of physical findings or any corroborating evidence, resulted in verdicts that were unsupported by credible, substantial evidence and were thus insufficient as a matter of law.

In addition, Sarza asserts that because John Doe's testimony was "so fraught with inconsistency and embellishment" his uncorroborated testimony that he saw him molest

Jane Doe 2 several times, once when his mother and younger sister went to the store and another time when their mother was in the bedroom, was insufficient to support any of the convictions involving Jane Doe 2. Sarza points to Jane Doe 2's initial denial that he had ever touched her and her trial testimony where she could not recognize him or remember any particular instances of when he touched her to argue that despite earlier suggestive questioning by her uncle, Corporal Anderson and the RCAT interviewer, there was not a sufficient quantum of credible evidence to sustain the three convictions regarding Jane Doe 2 because a child who had been molested would have remembered the incidents and she did not.

Sarza's various arguments essentially ask us to reweigh the evidence, which we cannot do. His trial counsel pointed out to the jury all the inconsistencies in the evidence presented by each child in court as compared to their earlier statements to their uncle, grandmother, mother, Corporal Anderson, and in their the RCAT interviews. The jurors heard and observed all the evidence, including Sarza's and the prosecution's experts, and could assess Jane Doe 2's and John Doe's credibility in light of defense's counsel's arguments and the law as instructed by the court. As discussed above, in cases charging multiple acts of child molestation over a period of time, generic testimony is adequate to sustain a conviction. (*Jones, supra*, 51 Cal.3d at p. 314.) The facts above reveal that there was more than sufficient evidence from which the jury could reasonably find that Sarza molested each child more than three separate times as charged. Jane Doe 2 had stated in her RCAT interview that Sarza had poked his finger in her bottom many times while they were in their bathroom and also had done it to her on a chair in the living

room. She had also told her uncle that Sarza had taken her into her bedroom and put his finger in her vaginal area while her mother was taking a shower one time and had told Anderson the same story before her RCAT interview.

John Doe had told Anderson, his uncle, his mother and the RCAT interviewer that Sarza had placed his finger in his butt or bottom at least three times and at trial had actually described more than five separate instances and places where such had occurred; i.e., in some bushes near Sarza's work, in a dirty or dusty house near Sarza's work, in Sarza's red car, at home when his mother and sisters had gone shopping, and another time at home when his mother was in the shower.

Such generic evidence regarding each child established the type of acts Sarza committed upon them, the number of acts and the general time period when those acts occurred, which was sufficient to satisfy the requirements under *Jones, supra,* 51 Cal.3d 294, and to substantially support the counts 6 through 11 convictions for lewd acts against the minor children.

Moreover, the sheer fact that Jane Doe 2 could not or would not "see" Sarza in court as the stepfather who had abused her does not establish a violation of Sarza's due process or fair trial rights as he claims. Jane Doe 1 had testified that Sarza's appearance had changed since the alleged acts of molestation had occurred nearly three years before trial, John Doe also could not identify Sarza in court as the stepfather who had abused him, and both young child victims were reluctant and embarrassed to testify in court. Because of the lapse of time, the change in his appearance, and their reluctance and embarrassment in testifying, it is understandable that Jane Doe 2 and John Doe might not

identify Sarza in court. Such merely provided additional facts the jury could consider in their determination of the credibility of the young child witnesses and their lack of identifying Sarza in court was fully argued by defense counsel in closing.

In sum, substantial evidence supports the jury's verdicts on counts 6 through 11.

III

ADMISSION OF CHILD VICTIM STATEMENTS

In limine, Sarza brought a motion to exclude the hearsay statements of Jane Doe 2 and John Doe made to family members on grounds they did not constitute "fresh complaints" and that they were more prejudicial than probative under Evidence Code section 352. At the hearing on the motion, when defense counsel stated that Sarza was also objecting to the hearsay statements of the minor children under *Crawford v. Washington* (2004) 541 U.S. 36, the court overruled the *Crawford* objection, noting there was no confrontation issue because the children would be testifying, commented that most of the statements would be coming in anyway as prior inconsistent or consistent statements, and asked the prosecutor how she was planning to introduce the statements of the alleged victims.

The prosecutor explained that the children had disclosed the abuse to their uncle and their grandmother right after it happened and that it was her "understanding under the fresh complaint doctrine, the facts that they made a disclosure comes in may not necessarily be exactly what they said to them. However, because they're testifying and because of the way I think the case is going to play out [the children's statements] will come in under the prior consistent or inconsistent statement anyway."

The trial judge agreed, saying "[w]hy don't we at least initially do it appropriately which is you can bring out that they made the complaint. Don't go into anymore details other than I think you're allowed to say, like, daddy touched us inappropriately. I think you can include that person as part of the fresh complaint. You can't go into the specifics of it as I understand." The court commented that "then once they're asked questions, then [it would] be allowing [the prosecutor] to get the full statements in."

By the time the children's uncle, Leonel, and grandmother, Gloria, testified at trial, both Jane Doe 2 and John Doe, as well as Jane Doe 1, had already testified and the RCAT interview of each child had been played for the jury. When both Leonel and Gloria initially testified, they discussed each of the child's disclosures to them and then each was questioned more fully about what he or she separately told their uncle and grandmother. Other than a few objections for some nonresponsive answers, defense counsel did not object to any questions or answers asked of Leonel or Gloria regarding the children's statements and on cross-examination asked, among other things, numerous questions about the specifics of the statements concerning the reported inappropriate touchings that each child made.

On appeal, Sarza contends that John Doe's and Jane Doe 2's statements to their uncle and grandmother were improperly admitted as "fresh complaints" and that the admission of the details of those statements was prejudicial error under the cautionary words in *People v. Brown* (1994) 8 Cal.4th 746 (*Brown*), that such "report or disclosure should be limited to the fact of the making of the complaint and other circumstances

material to this limited purpose." (*Id*. at p. 763.) We can find no prejudicial evidentiary error on this record.

As a preliminary matter, we note that neither party has clearly represented the record of the proceedings below. As the background of the in limine hearing reveals, the trial court did not expressly rule that the statements were all admissible as fresh complaints as Sarza represents. Nor did it explicitly rule that all of the statements were admissible as consistent or inconsistent statements as the People claim. Rather it appears the trial court admitted the facts of the initial disclosures of molest made to the children's uncle and grandmother, appropriately limited to comply with *Brown, supra,* 8 Cal.4th 746, and then impliedly agreed that additional questions about the children's details of the touchings would properly be admitted as either consistent or inconsistent statements in light of the representation of counsel at that time that the defense would be that the children lacked credibility due to the numerous inconsistencies in their various interviews and statements to others. Neither party asked the trial court to clarify its pretrial ruling on the matter and no other objection was made by Sarza to the children's statements when they were elicited during Leonel's or Gloria's testimony during trial.

As to those other statements, we apply "the abuse of discretion standard of review to any ruling by the trial court on the admissibility of evidence, including one that turns on the hearsay nature of the evidence in question, [citations]." (*People v. Waidla* (2000) 22 Cal.4th 690, 725.) As relevant here, Evidence Code section 1235 provides in part that "[e]vidence of a statement made by a witness is not made inadmissible by the hearsay rule if the statement is inconsistent with his [or her] testimony at the hearing . . . ." Such

statements are generally admissible at trial as substantive evidence as well as to impeach the witness because "the declarant is present in court *and subject to cross-examination*. 'The witness who has told one story aforetime and another today has opened the gates to all the vistas of truth which the common law practice of cross-examination and re-examination was invented to explore. The reasons for the change of face, whether forgetfulness, carelessness, pity, terror, or greed, may be explored by the two questioners in the presence of the trier of fact, under oath, casting light on which is the true story and which the false. It is hard to escape the view that evidence of a prior inconsistent statement, when declarant is on the stand to explain if he [or she] can, has in high degree the safeguards of examined testimony.' [Citation.]" (*People v. Zapien* (1993) 4 Cal.4th 929, 953, italics added; *People v. Hawthorne* (1992) 4 Cal.4th 43, 55, fn. 4.)

Similarly, evidence of a prior consistent statement is not made inadmissible by the hearsay rule if it is offered to rebut evidence of a subsequent inconsistent statement, or an express or implied charge of recent fabrication or bias or other improper motive. (Evid. Code, §§ 791,[4] 1236; *People v. Williams* (2002) 102 Cal.App.4th 995, 1011-1012.)

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4 Evidence Code section 791 states: "Evidence of a statement previously made by a witness that is consistent with his testimony at the hearing is inadmissible to support his credibility unless it is offered after: [¶] (a) Evidence of a statement made by him that is inconsistent with any part of his testimony at the hearing has been admitted for the purpose of attacking his credibility, and the statement was made before the alleged inconsistent statement; or [¶] (b) An express or implied charge has been made that his testimony at the hearing is recently fabricated or is influenced by bias or other improper motive, and the statement was made before the bias, motive for fabrication, or other improper motive is alleged to have occurred."

Here, both minor children, as well as their uncle and grandmother, were subject to cross-examination regarding the disclosure of the touching incidents and the statements each child made during the disclosures. Jane Doe 2 testified at trial that she did not remember anything about Sarza molesting her, that she was too embarrassed to remember what she told her uncle or anyone about the abuse, and that she was nervous and afraid of Sarza. Following Jane Doe 2's testimony, her RCAT interview was played in which she detailed how Sarza had sexually abused her by digitally penetrating her bottom on multiple occasions. John Doe testified in court about Sarza also digitally penetrating his "butt" numerous times, which was consistent with his RCAT interview, and additionally mentioned for the first time that Sarza had inserted his penis in his butt several times.

Because Sarza claimed that the children's various statements to the interviewers and other were lies and contradictions that made their stories incredible, the statements each made to their uncle and grandmother were respectively inconsistent and consistent to their trial testimony. Specifically, Jane Doe 2's statements to her uncle and grandmother were both consistent with her statements made during her RCAT interview and inconsistent with her obviously evasive trial testimony, whereas John Doe's statements to his uncle and grandmother were consistent for the most part with his trial testimony and RCAT interview. Under these circumstances, we can find no abuse of discretion in the admission of the complained of additional details in the children's statements to Leonel or Gloria.

However, even if we were to assume error in the admission of the specific details of the respective incidents of touching reported by each child to their uncle and

grandmother, we would find the error harmless. As we have already determined, the children's statements were properly admitted as consistent or inconsistent statements based on Sarza's defense and the numerous unobjected to statements regarding the alleged molestations in evidence at the time of Leonel's and Gloria's testimony. Therefore, even without the objected to additional details of the reported molestations in their testimony, there is no reasonable probability of a more favorable outcome on whether the molestations occurred. (See *People v. Watson* (1956) 46 Cal.2d 818, 836 (*Watson*).)

IV

ALLEGED PROSECTORIAL MISCONDUCT

During closing arguments, when outlining the various issues in this case, the prosecutor noted that the judge would instruct the jury regarding the discrepancies in the testimony and it would be up to the jurors to decide those things that are important. The prosecutor noted that people forget things, especially because of the three year lapse, and that even though the children may or may not have remembered Sarza's face, they knew who he was. When the prosecutor stated, "[w]hen you think about the seriousness of what happened, and when you think about what these children are left to deal with and are left to face for the rest of their lives," defense counsel objected as improper. The court overruled the objection and the prosecutor continued to review the jurors duty to determine whether the children were coached or whether these things really happened.

The prosecutor then stated:

> "And you may not like what has happened. You may not like the way that the people remembered things. You may not like the decisions that (Jane Doe 1) made that had a tremendous impact on the lives of her children, but at the end of the day this happened to those kids, and I ask you to keep that in mind when you're thinking about the peripheral things. Because what really matters is that justice is done for them. [¶] I think it's pretty clear that the domestic violence happened. And we talked about that too, about being able to follow the law even if you don't like it, even if you don't like the way that person ran their lifestyle or the choices that they made, he hit her. And that's just the way the law is. He hit her. It's unlawful. He's guilty of that. And so you may not feel for that woman, but I'm asking you to feel for the children."

This time when defense counsel objected to the prosecutor's statement as improper, the court said, "Right. Ladies and gentleman, you shouldn't be making your decisions based upon what you feel for the children. Does everybody understand that? All right. You may continue."

At the conclusion of the prosecutor's argument, during a short recess, the trial judge noted there had been three objections made during the prosecutor's initial closing argument and explained why it ruled the way it did on each. As to the two relevant to this appeal, the judge stated:

> "Secondly, the first was about think about what the children are going through. I think that if it is a problem it's a very mild problem. It . . . just can be seen as emphasizing the importance of not trivializing what's going on here. And this is a real world life and people are hurt. [¶] But I think when you say make your decision based upon what you feel for the children, I just thought that I should draw the line there, although, again, I didn't think it was anything egregious. I thought we were getting a little too far afield there because we're not asking them to decide the case on the facts."

During the defense closing arguments, counsel told the jury, among other things, that "[t]o feel sorry[t]hat's not what our system is about. Our system of justice is not

about feeling sorry. Justice is a jury looking at the evidence and deciding whether allegations have been proved beyond a reasonable doubt. . . . I don't want you to feel sympathy for those children in making a decision one way or the other." Counsel explained that "clearly, if you have a heart you have to feel bad for these children because they are victims of something. They are victims of dysfunction or something. And sympathy is something that we as human beings should all be capable of. But feeling sympathy for a child doesn't mean that something happened to them."

On appeal, Sarza complains that the "pity the poor children" and "feel for the children" arguments by the prosecutor were "deceptive or reprehensible methods to attempt to persuade . . . the jury" (*People v. Hill* (1998) 17 Cal.4th 800, 819) to decide the questions of guilt by thinking of the children instead of dispassionately basing their decisions on the evidence in the case. He argues that because child molestation cases are difficult and "gut-wrenching" for a jury to decide, the prosecutor's statements and the court's "mild" admonition rendered his trial fundamentally unfair. We conclude there was no prejudicial error.

Generally, " ' "[a] prosecutor's . . . intemperate behavior violates the federal Constitution when it comprises a pattern of conduct 'so egregious that it infects the trial with such unfairness as to make the conviction a denial of due process." ' [Citations.] Conduct by a prosecutor that does not render a criminal trial fundamentally unfair is prosecutorial misconduct under state law only if it involves " ' " 'the use of deceptive or reprehensible methods to attempt to persuade either the court or the jury.' " ' [Citation.]" (*People v. Samayoa* (1997) 15 Cal.4th 795, 841.) Although a prosecutor " 'has broad

discretion to state [his or her] views as to what the evidence shows and what inferences may be drawn therefrom.' " (*People v. Sims* (1993) 5 Cal.4th 405, 463), it is " 'settled that an appeal to the jury to view the crime through the eyes of the victim is misconduct . . . ; an appeal for sympathy for the victim is out of place during an objective determination of guilt. [Citations.]' [Citation.]" (*People v. Arias* (1996) 13 Cal.4th 92, 160 (*Arias*).)

Thus, although we agree with the trial court that the prosecutor's initial comment about thinking of the children was merely a comment regarding the evidence in this case, we also agree with the court that the prosecutor crossed the line and committed misconduct in making an appeal to the sympathy, passion or emotion of the jury when she asked the jurors to "feel for the children." (*Arias, supra*, 13 Cal.4th 92, 160.) Nonetheless, as the trial court determined, in light of this record, the prosecutor's improper plea was not egregious or prejudicial.

Even though the credibility of the child victims was at issue, as noted above, the evidence was overwhelming in support of the findings that Sarza had inappropriately touched them numerous times. In addition, the prosecutor's attempt to appeal to the jurors' passions was brief and not a repetitive method throughout her lengthy argument that amounted to a pattern of egregious conduct. Rather, the prosecutor's fleeting plea was immediately halted by a proper objection, the court's admonishment, and defense counsel's reminder to the jurors that they could not consider the sympathy of the victims in their decisions, which needed to be based upon the evidence. Further, the court had instructed the jurors that it was their province alone to determine the facts only upon the evidence presented at trial, that the attorney's comments and remarks were not evidence,

and that they must not let "bias, sympathy, prejudice, or public opinion influence [their] decision." (CALCRIM Nos. 200, 222.) We presume the jurors followed the given instructions and the court's admonishment. (*People v. Harris* (1994) 9 Cal.4th 407, 426.) Consequently, we can find no reasonable probability that the prosecutor's appeal to the jurors' sympathy for the child victims affected the verdicts rendered. (*Watson*, *supra*, 46 Cal.2d at p. 836.)

V

CUMULATIVE ERROR

Sarza finally argues that even if the multiple errors in this case were not sufficient in and of themselves to require reversal, the cumulative effect of such errors requires reversal of the judgment as violative of his due process rights. We disagree. Because we have found no prejudicial error in any of Sarza's claimed instances of error, he cannot show cumulative prejudicial error (*People v. Beeler* (1995) 9 Cal.4th 953, 994), or that he was denied due process or a fair trial. (See *People v. Kronemyer* (1987) 189 Cal.App.3d 314, 349.)

DISPOSITION

The judgment is affirmed.

HUFFMAN, Acting P. J.

WE CONCUR:

NARES, J.

AARON, J.